

Thankam and Another Vs. Sreekumar and Twenty Four Others

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Court : Chennai

Decided On : Oct-17-2000

Reported in : (2001)1MLJ156

Judge : K. Sampath, J.

Acts : Indian Limitation Act, 1963 - Sections 5 and 14; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 9, Rule 13

Appeal No. : C.R.P. No. 473 of 2000

Appellant : Thankam and Another

Respondent : Sreekumar and Twenty Four Others

Advocate for Def. : Mr. Sreekumaran, Nair, Adv.

Advocate for Pet/Ap. : Mr. T.R. Rajagopalan, ;Additional Advocate General for Mr. T.R. Rajaraman, Adv.

Judgement :

ORDER

1. This Civil Revision Petition has been filed against the order of the learned Subordinate Judge, Kuzhithurai dismissing the application filed by the petitioners herein under Section 5 of the Limitation Act seeking condonation of the delay of 2352 days in preferring the appeal against the decree passed in O.S.No.122 of

1979 on the file of the Additional District Munsif, Kuzhithurai.

2. The necessary facts for the disposal of the Civil Revision Petition are as under:

The petitioners were the defendants 22 and 23 in the suit. The suit was filed by the plaintiffs for partition claiming one half share over the plaint items. In the suit, it was contended by the petitioners' father that the petitioners were necessary parties inasmuch as their mother, who was the 10th defendant in the suit had taken sale deeds in their names and that she was representing them as guardian. The petitioners were accordingly impleaded as defendants 22 and 23 in the suit. At that time, the petitioners were minors. Notice was sent to their mother, the 10th defendant. As she refused to accept the notice, there was a court guardian appointed. According to the petitioners, the court guardian appointed was one John Issac, but mother counsel by name, Johnson had represented them. It would appear that the court guardian filed a written statement in conformity with the written statement filed by the petitioners' mother as 10th defendant in the suit. The suit came up for trial and most of the defendants were set ex parte. Evidence was let in on the side of the plaintiffs, documents were marked and a preliminary decree came to be passed on 28.6.1990. In the final decree proceedings, the petitioners were served with notices and at that stage, the petitioners came out with an application stating that they were impleaded in the suit while they were minors, that they had not engaged any counsel, that after the death of their father, they were not recorded as legal heirs, that the fact that they had become majors was not reported to the Court, that the preliminary decree worked great hardship and loss to them and the same had to be set aside. The application by the petitioners was resisted by the plaintiffs contending that the petitioners had no prima facie case, that they did not raise the contention that they were interested in the suit properties and that in any event, the petition was barred by limitation.

3. The application was dismissed, against which a Civil Miscellaneous Appeal in C.M.A.No.37 of 1995 was filed before the Sub Court, Kuzhithurai. The order of the first court was confirmed. Against the same, the petitioner filed C.R.P.No,3225 of 1996 before this Court. By order dated 7.2.1997, Justice S.S. Subramani, dismissed the Civil Revision Petition. Thereafter, the petitioners filed an appeal

against the preliminary decree with an application to condone the delay of 2352 days in preferring the appeal. According to the petitioners, they were instructed by their counsel at Madras to file a regular appeal against the judgment and decree passed by the trial Court on 28.6.1990, that they had filed an application for setting aside the ex parte decree and also an appeal therefrom only under the impression that a petition to set aside the ex parte order under Order 9, Rule 13 was maintainable, that only because of that they could not file the regular appeal in time. They also alleged that on merits they had a substantial case, that they had title deeds, patta and tax receipts for their share of the property. The delays in filing the appeal was neither wilful nor wanton but the said delay was due to the circumstances set out already. The application for condonation of delay was opposed by the contesting respondents. If according to the petitioners their rights were not protected by the guardian, their remedy would be to file a suit as stated in the order in C.R.P.No.3225 of 1996. They also alleged that the petitioners had suppressed material facts and that they had not explained the delay properly.

4. The learned Subordinate Judge in a considered order dated 3.1.2000 rejected the case of the petitioners and dismissed the application. The learned Subordinate Judge, in particular, referred to the observation made in the order in the C.R.P. that the proper remedy for the petitioners would be to file a suit on the ground that the guardian had been negligent in protecting their rights and seek to get the decree set aside on that ground. The learned Subordinate Judge also found that the petitioners had not properly explained the long delay of 2352 days in filing the appeal. The learned Subordinate Judge found that there was lack of good faith in pursuing the remedy. He relied on the decision of this Court in *R. Radha v. N.R. Saraswathy*, 1989 (1) LW 353 and dismissed the application.

5. Mr.T.R. Rajagopalan, learned Senior Counsel appearing for Mr.T.R. Rajaraman, counsel for the petitioner submitted that there had been a huge fraud played on the Court, that the Court had appointed one C. John Issac as court guardian for the then minor petitioners but one Johnson had appeared as court guardian for the petitioners and filed the written statement and according to the learned Senior Counsel, if the records were perused, the contention would stand substantiated. On this representation of the learned Senior Counsel, the records were sent for

and perused. What has been made available in the typed set of papers, as the order passed by the learned District Munsif, Kuzhithurai on 18.12.1990, does not reflect the correct state of affairs. The endorsement in the true copy furnished to the petitioners regarding the appointment of the Court Guardian reads as follows:

'D-10 called absent, set exparte. Advocate T. John Issac is appointed as Court Guardian on payment of patta of Rs.25 due to by hand petition allowed. Id. D.M.'

A perusal of the original clearly shows that it was not John Issac, who was appointed as Court Guardian but one Johnson was appointed as court guardian and it was only Johnson who had filed the written statement on behalf of the petitioners. Only the initial of Johnson had been wrongly mentioned as 'T' instead of 'C'. This aspect has been clearly noticed by the learned Subordinate Judge and is mentioned in his order. No doubt, in the Civil Revision Petition, Justice S.S. Subramani has referred to John Issac as having been appointed as court guardian and that as he retired from practice, Johnson was appointed as Court Guardian subsequently. Significantly, this objection had not been raised before the learned Judge when the Civil Revision Petition was heard. This is a subsequent 'discovery'. I do not think anything turns on this to set at naught the proceedings taken on behalf of the petitioners by the court guardian, Mr. Johnson.

6. The next contention raised by the learned Senior Counsel is that the delay had been properly explained and that the petitioners were entitled to invoke the provisions of Section 14 of the Limitation Act and have the delay condoned. This clearly overlooks the observation made by Justice S.S. Subramani in the Civil Revision Petition in C.R.P.No.3225 of 1996 which reads as under:

'Learned counsel for the petitioners submitted that they have got sale deeds, and they have got valid contentions to be put forth before trial court. They were not aware whether the court guardian has even filed written statement. If that is the grievance, I do not think the remedy of the petitioners to file an application to have the decree set aside, but to file a properly instituted suit on the ground that the guardian had been negligent in protecting their rights, and have the decree set aside on that ground.'

7. Mr.Sreekumaran Nair, learned counsel for the contesting respondents referred to the commentary by Sarkar on Evidence (Fifteenth Edition, 1999 pg 857) wherein it is stated as follows:

'The most natural course for a party to a judgment who seeks to impeach it for fraud is by an application to the court which pronounced the judgment, to set it aside or to bring a regular suit.'

8. Mr.Sreekumaran Nair, learned counsel for the respondents brought to my notice the decision of K.M. Natarajan, J. in R. Radha v. N.R. Saraswathy, 1989 (1) LW 353 wherein under almost similar circumstances, the learned Judge held that there was no bonafide in the application filed under Section 5 of the Limitation Act to condone the delay of 2144 days in filing the appeal against the ex parte decree in that case. It was also brought to my notice by Mr.Sreekumaran Nair that the petitioners have already filed a suit for setting aside the decree.

9. Having regard to what is stated above, I find that there are absolutely no merits in this C.R.P. The learned Subordinate Judge has properly considered the case of the petitioners and has come to the conclusion that there were no merits in the case of the petitioners. There is no error of jurisdiction. There is no material irregularity warranting interference under Section 115 of the C.P.C. The Civil Revision Petition fails and the same is dismissed. No costs.

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